RECENT DECISIONS

APPEAL AND ERROR—REVIEW—TRUTH OF EVIDENCE.—In an action in the trial court the trial judge improperly excluded certain evidence, and directed judgment for the plaintiff. The defendant appealed. *Held*, the evidence improperly excluded must be accepted as true for the purpose of review by the appellate court. *Illinois Central R. Co.* v. *Threefoot Bros. & Co.* (Miss.), 83 South. 635.

In reviewing the action of the court in directing a verdict, the reviewing court will assume the existence of every material fact which the evidence of the complaining party tends to prove. See *Northdrufi* v. *City of Lincoln*, 66 Neb. 430, 96 N. W. 163; *Paxton* v. *State*, 59 Neb. 460, 81 N. W. 383. Therefore, in an action for personal injury, where a verdict was directed for the defendant, upon the question whether there was sufficient evidence that the defendant was negligent to go to the jury, the court held that for the purpose of inquiry the evidence must be construed in the light most favorable to the plaintiff. *Dunn* v. *Wilmington, etc., R. Co.*, 124 N. C. 252, 32 S. E. 711. So again, in determining whether there was error in directing a verdict for the defendant in an action for negligence, the appellate court will consider the evidence of the plaintiff alone, uncontradicted and unqualified by the evidence on the part of the defendant. See *Irwin* v. *Gulf, etc., R. Co.* (Tex. Civ. App.), 42 S. W. 661.

Where a party who is entitled to have a question of fact passed on by a jury moves the court to direct a verdict in his favor and the motion is sustained, he is, on appeal, not entitled to a settlement in his favor of the question of fact, and hence must rest on the proposition that he is entitled to a judgment, as a matter of law, on an interpretation of the evidence most favorable to the other party. *Rosenstein* v. *Traders' Ins. Co.*, 102 App. Div. 147, 92 N. Y. Supp. 326.

Where each party has requested the trial court to direct a verdict, all the facts and inferences necessary to support the judgment, and which could fairly have been derived from the proofs given, must, on appeal, be deemed to have been found in favor of the party for whom the verdict was directed, in the absence of a request by the other party to have any question submitted to the jury. *Davis* v. *True*, 89 App Div. 319, 85 N. Y. Supp. 843. See also *Koehler* v. *Adler*, 78 N. Y. 287.

AUTOMOBILES—DUTY OF OWNER TO GUEST.—The plaintiff, while riding at the invitation of the defendant in the defendant's automobile, was injured in an accident. This action was brought for personal injuries. The trial judge charged the jury that the defendant was bound to use ordinary care in avoiding the accident. *Held*, the instruction is correct. *Roy* v. *Kirn* (Mich.), 175 N. W. 475.

The duty of the owner of a conveyance to his guest riding with him at his invitation is a question upon which the courts have only recently been called upon to pass. This is undoubtedly due to the advent and

increased use of the automobile and we may look for cases involving similar questions to arise with increasing frequency in the future. See *Patnode* v. *Foote*, 153 App. Div. 494, 138 N. Y. Supp. 221; *Massaletti* v. *Fitzroy*, 228 Mass. 487, 118 N. E. 168, L. R. A. 1918C, 264.

On this question the courts seem to be dividing into two groups. The majority view maintains that the owner is "required to exercise that degree of care and caution which would seem reasonable and proper from the character of the thing undertaken." *Avery* v. *Thompson* (Me.), 103 Atl. 4, L. R. A. 1918D, 205. The minority of the courts hold that the owner is only liable to his guest for gross negligence in operating his automobile. *Massaletti* v. *Fitzroy, supra.*

Where the plaintiff, while riding in the defendant's automobile as an invited guest, was injured in an accident due to the defendant's negligence in attempitng to cross a railroad track in front of an approaching train, a verdict for the plaintiff was sustained. *Avery* v. *Thompson, supra.* The court held that the defendant was liable since he increased the danger ordinarily attendant upon riding in an automobile, and his attempt to cross in front of the train when it appeared that he might have stopped was negligence. This case seems to push the doctrine to the extreme limit, for the driver and owner of the car was killed in the accident which injured the plaintiff, the action being brought against his estate. This apparent hardship has been explained as arising out of the high regard the law has for human life, and as not unduly burdening the automobilist. *Perkins* v. *Galloway*, 194 Ala. 265, 69 South. 875, L. R. A. 1916E, 1190, affirmed on rehearing in 73 South. 956. But where the plaintiff urges the defendant to desist from his recklessness, the liability is clearer, and the courts hold that ordinary care is the test. *Beard* v. *Klusmeier*, 158 Ky. 153, 164 S. W. 319, 50 L. R. A. (N. S.) 1100, Ann. Cas. 1915D, 342; *Fitzjarrel* v. *Boyd*, 123 Md. 497, 91 Atl. 547. Where the driver is not negligent but the accident is simply unfortunate, it is held that there can be no recovery. *Jacobs* v. *Jacobs* (La.), 74 South. 992, L. R. A. 1917F, 253. The instant case follows the rule as laid down in these authorities. See also *Lochhead* v. *Jensen*, 42 Utah 99, 129 Pac. 347; *Routledge* v. *Rambler Auto. Co.* (Tex. Civ. App.), 95 S. W. 749. This rule is in line with the authorities in the case of accidents to guests riding in horse-drawn vehicles. The legal principles involved are the same. See *Mayberry* v. *Sivey*, 18 Kan. 291; *Siegrist* v. *Arnot*, 10 Mo. App. 197; *Pidgeon* v. *Lane*, 80 Conn. 237, 11 Ann. Cas. 371; *Patnode* v. *Foote, supra.*

The rule that the owner is liable to his guest only for gross negligence is maintained in Massachusetts after a masterful review of the authorities in *Massaletti* v. *Fitzroy, supra.* The court views the gratuitous carriage of a person as a bailment for the sole benefit of the bailor and consequently only slight care is demanded of the bailee, or, negatively, he is liable only for gross negligence. It is further held that degrees of negligence are still the law in that State. The opinion, however, overlooks the difference between a mere property bailment and the carriage of a human being. In the latter case a higher standard of care is exacted, even though the service is gratuitous. See *Perkins*

v. *Calloway, supra; Philadelphia, etc., R. Co.* v. *Derby*, 14 How. 468. The Massachusetts view seems to be adopted in Pennsylvania, but in applying it to the facts in the particular case the court does not quite plumb the track. *Cody* v. *Venzie* (Pa.), 107 Atl. 383. This statement of the case is, however, distinctly repudiated in Maine, but the court states that from a given state of facts the same conclusion would probably be reached under both rules. *Avery* v. *Thompson, supra.*

The English authorities seem unsettled on the question. The early cases hold that gross negligence must be shown to permit recovery. See *Moffat* v. *Bateman*, 6 Moore, P. C. (N. S.) 370; *Lygo* v. *Neebold*, 9 Exch. 302. But these cases have been modified in the later decisions, and the distinction between property and personal gratuitous bailments pointed out. *Harris* v. *Perry & Co.*, L. R. [1903] 2 K. B. 219. A ruling following this case is in line with the weight of American authority, although the judge expressed doubt as to its soundness. *Karavias* v. *Gallinocas* (1917), 143 L. T. Jo. 237. (See L. R. A. 1918C, 277.)

The question seems not to have been presented to the Virginia courts. It is believed that all the cases on the subject at present adjudicated are cited above.

For further discussions as to the liabilities of owners and drivers of automobiles, see 2 VA. LAW REV. 189, 298, 624; 4 VA. LAW REV. 234; 6 VA. LAW REV. 544.

CONSTITUTIONAL LAW—DIVORCE—ALIMONY—IMPRISONMENT FOR NONPAYMENT.—The defendant contumaciously refused to pay temporary alimony decreed against him during a divorce suit brought by his wife. He gave no excuse save that his wife was of bad moral character. On the hearing, the divorce was granted with permanent alimony, and it was ordered that unless the arrears of temporary alimony were paid within fifteen days the defendant should be imprisoned for ten days. The defendant appealed. *Held*, the decree should be affirmed. *West* v. *West* (Va.), 101 S. E. 876.

By the better rule, alimony is not a debt within the meaning of statutes or constitutions prohibiting imprisonment for debt. *Ex parte Perkins*, 18 Cal. 60; *Smith* v. *Smith*, 81 W. Va. 761, 95 S. E. 199; *West* v. *West, supra. Contra, Leeder* v. *State*, 55 Neb. 133, 75 N. W. 541. *Coughlin* v. *Ehlert*, 39 Mo. 285. But imprisonment for non-payment of alimony should not be resorted to unless it appears that the defendant is contumacious. *Ex parte Silvia*, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58. See *West* v. *West, supra.*

Payment of counsel fees and expenses in a divorce suit may also be enforced by an attachment for contempt. *Van Dyke* v. *Van Dyke*, 125 Ga. 491, 54 S. E. 537. And under some statutes, the court may require the husband to give security for the payment of alimony and upon his refusal to do so may imprison him for contempt. *Wright* v. *Wright*, 74 Wis. 439, 43 N. W. 145.

While a husband who derives an income from any trade, profession or employment may be forced to pay alimony from such source, yet the courts cannot force a defendant to work, and, *a fortiori*, they can-